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In the

SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH AND RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., ET AL.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR THE STATE OF ALABAMA, BY AND THROUGH ITS ATTORNEY GENERAL AND SECRETARY OF STATE, AS *AMICUS CURIAE*, SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*

The State of Alabama, by and through its Attorney General, Bill Pryor, and Secretary of State, Jim Bennett, respectfully submits this Brief as *amicus curiae* pursuant to Sup. Ct. R. 37.4. *Amicus* submits this Brief because of the striking similarities between this case and an Alabama case decided by the United States Court of Appeals for the Eleventh Circuit five years ago, *Roe* v. *Alabama*, involving the counting of unwitnessed absentee ballots in the 1994 election for Chief Justice of the Supreme Court of Alabama. That case resulted in a series of decisions from the Eleventh Circuit holding that a post-election change in the procedures for counting absentee ballots violated the First and Fourteenth Amendments, which require state election procedures to be fundamentally fair. *See Roe* v. *Alabama*, 43 F.3d 574 (11th Cir.) ("*Roe I*") (certifying question to Supreme Court of Alabama), *remanded to district court for evidentiary hearing after certified question answered*, 52 F.3d 300 (11th Cir.) ("*Roe II*"), *cert. denied*, 516 U.S. 908, *appeal after remand to district court*, 68 F.3d 404 (11th Cir.) ("*Roe III*"), *stay denied sub nom. Hellums* v. *Alabama*, 516 U.S. 938 (1995). The Petitioner in this case expressly relied upon these decisions of the Eleventh Circuit in requesting review by this Court in both this case and the earlier decision of this Court. *See* Emergency App. for Stay at 38; Pet. Br. at 28, Pet. Reply Br. at 19, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). The State of Alabama, by and through its Attorney General, and the Secretary of State of Alabama were defendants in *Roe* v. *Alabama*. *See Roe I*, 43 F.3d at 574; *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404. The current Attorney General of Alabama, then a deputy attorney general, personally represented the State and the current Secretary of State in that litigation. *See Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404; *see also Roe* v.

Mobile County Appointing Bd., 904 F. Supp 1316, 1317 (S.D. Ala.), *aff'd sub nom. Roe* v. *Alabama*, 68 F.3d 404 (11th Cir.), *stay denied*, 516 U.S. 938 (1995).

Relying on the constitutional principles applied in *Roe* v. *Alabama*, the State of Alabama reformed its election laws to ensure that Alabama courts cannot change the rules for counting absentee ballots after an election. *See* Ala. Code § 17-10-10 (Supp. 2000) ("No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths) . . . ."). The Attorney General and Secretary of State have relied on *Roe* v. *Alabama* in enforcing the election laws of Alabama, advising election officials, and ensuring that election procedures in Alabama are and remain fundamentally fair. *See, e.g.*, Opinion to the Hon. Leland Avery, Hale County Probate Judge, Ala. A.G. Op. No. 2000-180, at 4 (June 26, 2000) <http://www.ago.state.al.us/pdfopinions/2000-180.pdf> ("[T]he United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates."); Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227, at 3 (May 31, 1996) <http://www.ago.state.al.us/pdfopinions/99-00227.pdf> ("In this circumstance, under the *Roe* decision, the state election officials cannot count unwitnessed absentee ballots without violating the [F]ourteenth [A]mendment.").

Having now relied on the principles of due process and equal protection applied in *Roe* v. *Alabama* for several years, *amicus* has a profound interest in seeing those principles upheld and consistently enforced. This is especially true in the unique context of the election of the

President and Vice President of the United States, in which all States have a profound interest. As this Court has acknowledged,

> in the context of a presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. . . . [T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by votes beyond the State's boundaries.

Anderson v. *Celebreeze*, 460 U.S. 780, 794–95 (1983) (citations omitted).

The judgment of the Supreme Court of Florida must be reversed because that court changed the rules governing election protests and contests in Florida, in violation of Article II, § 1, cl. 2 of the U.S. Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and 3 U.S.C. § 5 (1994). *Amicus* urges this Court to uphold the First and Fourteenth Amendment guarantees of fundamentally fair election procedures so that States may not, after a presidential election, employ arbitrary standards and retroactively change their canvassing, certification, and contest procedures to alter the outcome of an election.

SUMMARY OF ARGUMENT

Because the right to vote is a fundamental right, the constitutionality of state election procedures rests on

whether those procedures are fundamentally fair. Fundamental fairness requires election officials to refrain from changing the rules for counting ballots after an election to alter the outcome. Fundamental fairness also requires each State to establish — before an election — objective and meaningful standards for counting ballots and adhere to those standards after the election to protect the First and Fourteenth Amendment rights of both voters and candidates. Adherence to these guarantees of fundamental fairness requires special deference to the authority of legislatures to establish rules for counting votes before an election rather than allowing courts retroactively to create rules for resolving post-election disputes. Because the decision of the Supreme Court of Florida violates due process, equal protection, and the First Amendment in the election of the President and Vice President of the United States, this Court should reverse that decision and enjoin the use of the arbitrary manual recounts of ballots in Florida.

ARGUMENT

I. MATERIAL POST-ELECTION CHANGES IN STATE CANVASSING PROCEDURES VIOLATE DUE PROCESS.

This Court has long held that voting is "a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). Because the right to vote is so fundamental, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). In this context, "the right

of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 554.

In 1995, the United States Court of Appeals for the Eleventh Circuit was called upon to apply these principles in *Roe* v. *Alabama*, a case involving a state circuit court's order to count absentee ballots that had not been properly witnessed or notarized in accordance with state law. The Eleventh Circuit correctly observed in *Roe I* that "federal courts do not involve themselves in garden variety election disputes. If, however, the election process itself reaches the point of fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order." 43 F.3d at 580 (citations and internal quotation marks omitted) (quoting *Curry* v. *Baker*, 802 F.2d 1302, 1315 (11th Cir.), *cert. denied*, 479 U.S. 1023 (1986), in turn quoting *Welch* v. *McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985), and *Duncan* v. *Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B Sept. 1981), *cert. denied*, 459 U.S. 1012 (1982)). Like the case now before this Court, *Roe* was no "garden variety" election dispute. As in this case, the post-election change in election procedures by the state courts in *Roe* raised serious questions about the fundamental fairness of the election process. Because the situation in *Roe* v. *Alabama* was so similar to the present case, *Roe* provides an excellent analytical framework for examining the due process principles at stake in this case.

A. *Roe* v. *Alabama*

Before the November 1994 general election, it was a uniform statewide practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *Roe I*, 43 F.3d at 578; *Roe III*, 68 F.3d at 406–07 (stating that the district court's findings, which were

"supported overwhelmingly by the evidence," showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). A state circuit court nonetheless ordered unwitnessed absentee ballots to be counted after the 1994 general election. Because the candidates for Chief Justice were separated by a mere 200 to 300 votes before the court entered its order, the order placed the outcome of the race for Chief Justice in doubt. *Roe I*, 43 F.3d at 578. As the Court is no doubt aware, the 200 to 300 vote spread in *Roe* is similar to the narrow margin separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Alabama court's order was challenged in a 42 U.S.C. § 1983 (1994) action brought in the United States District Court for the Southern District of Alabama. The district court promptly granted a preliminary injunction halting the counting of unwitnessed absentee ballots. In its order, the district court specifically found that it was an established practice in Alabama not to count unwitnessed absentee ballots. Moreover, the district court held that adhering to the state court order and changing the practice of not counting unwitnessed absentee ballots would violate the First and Fourteenth Amendments. *Roe I*, 43 F.3d at 579.

On appeal to the Eleventh Circuit, the *Roe* plaintiffs argued that enforcement of the state court order

> would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer that would result in fundamental unfairness and would violate plaintiffs' right to due process of law in violation of the Fourteenth Amendment, and that this violation of the plaintiffs' rights to vote and . . . have their votes properly and honestly counted

> constitutes a violation of the First and Fourteenth Amendments.

Id. at 580 (internal quotation marks omitted). The *Roe* plaintiffs further argued "that the [state] circuit court's order requiring the state's election officials to perform the ministerial act of counting the contested absentee ballots, if permitted to stand, will constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." *Id.* at 581 (footnotes omitted). The Eleventh Circuit agreed with the *Roe* plaintiffs and determined that departing from Alabama's longstanding policy of not counting unwitnessed absentee ballots would indeed violate the First and Fourteenth Amendments.

In deciding *Roe I*, the Eleventh Circuit held that departing from Alabama's previous practice of not counting unwitnessed absentee ballots "would have two effects that implicate fundamental fairness." *Id.* "First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements . . . . Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id.* The court also stated that "had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and [those] who did not vote would have voted absentee." *Id.* at 582 (distinguishing *Partido Nuevo Progresista* v. *Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981)). On these grounds — that retroactively counting improperly executed absentee ballots would disenfranchise or dilute the votes of others and that altering election rules *post hoc* would upset the legitimate expectations of the voters

and candidates — the Eleventh Circuit ruled that complying with the state court's *post hoc* change in election procedures would violate the First and Fourteenth Amendments.

The Eleventh Circuit refused to require the Roe plaintiffs to pursue their claims in state court. *Id.* at 582. The court noted that, under Ala. Code § 17-15-6 (1995), Alabama courts are jurisdictionally barred from deciding statewide election contests. The court concluded that the state legislature, which has exclusive authority to decide an election contest involving the office of Chief Justice, *see* Ala. Code § 17-15-52 (1995), was "not an adequate or proper forum for the resolution of the federal constitutional issues presented." *Roe I*, 43 F.3d at 582.

The Court of Appeals did, however, abstain from finally adjudicating the plaintiffs' claims to certify a question to the Alabama Supreme Court asking whether absentee ballots that were not properly notarized or witnessed could nonetheless be counted under Alabama law. *Id.* at 583. The Supreme Court of Alabama, in answering the certified question, affirmed the order of the state circuit court and held that unwitnessed absentee ballots in "substantial compliance" with state law should be counted. *Roe* v. *Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221–22 (Ala. 1995).

Within a month of the Alabama Supreme Court's decision, the Eleventh Circuit remanded the case to the district court for trial. *Roe II*, 52 F.3d at 301. The Eleventh Circuit specifically directed the district court to address seventeen factual issues. Chief among these was the question of whether there was an established practice of including or excluding improperly executed absentee ballots in previous elections in Alabama. *Id.* at 302–03. Following *Roe II*, the defendant class of voters who sought to have their unwitnessed absentee ballots counted

petitioned this Court for a writ of certiorari. That petition was denied. *Davis* v. *Alabama*, 516 U.S. 908 (1995).

Following a three-day trial, the district court found that "the practice in Alabama prior to the November 8, 1994 election had been uniformly to exclude [improperly executed absentee] ballots." *Roe III*, 68 F.3d at 406–07. Accordingly, the district court concluded the *Roe* plaintiffs were entitled to relief and entered an order directing the Alabama Secretary of State to certify the results of the Chief Justice and State Treasurer elections without counting unwitnessed absentee ballots. *Id.* at 407. The defendant class of voters that had cast improperly executed absentee ballots then appealed to the Eleventh Circuit. *Id.*

In *Roe III*, the Eleventh Circuit concluded that the district court's findings of fact were "supported overwhelmingly by the evidence." *Id.* The appeals court also reaffirmed its holdings in *Roe I* and *Roe II*. *Id.* at 408. The court again rejected the appellants' plea to abstain and allow the state courts to decide the contested elections for Chief Justice and State Treasurer. The appellants argued, in essence, that state courts should have been given the opportunity to apply the Alabama Supreme Court's opinion in *Roe* v. *Mobile County Appointment Board* and grant them relief by ordering their improperly executed absentee votes to be counted. The Eleventh Circuit rejected this argument, again noting that it was "highly doubtful" that the state courts had jurisdiction to grant such relief given the jurisdictional bar in Ala. Code § 17-15-6. *Id.* The court determined that the Roe plaintiffs had no adequate state forum for the vindication of their federal constitutional claims and promptly affirmed the district court's order. Because time was of the essence, the Court of Appeals directed its clerk to issue the court's mandate instanter.

The defendant class of voters who wanted their improperly executed absentee ballots counted immediately applied for a stay from this Court. Justice Kennedy granted a temporary stay on October 14, 1995, while this Court considered the matter. The Court then denied the stay application on October 19, 1995. *Hellums* v. *Alabama*, 516 U.S. 938 (1995). Chief Justice Perry O. Hooper, Sr., was certified as the winner of the 1994 election and sworn into office the next day.

B. The Costs and Consequences of *Roe* v. *Alabama*

Roe v. *Alabama* ended with a reaffirmation of the guarantees of the First and Fourteenth Amendments, as interpreted by this Court, that state election procedures must be fundamentally fair. Complete justice was not done, however, because the harm caused by the state circuit court order could not be undone. Because of the state circuit court's order, Chief Justice Hooper was not certified as the winner of the November 1994 election until October 20, 1995. *See* Ala. Rptr., 656–659 So. 2d, at IX n.2. He was sworn in later the same day, more than nine months after he should have taken office on January 16, 1995. *Id.* at IX n.1. As a result of the circuit court's attempt to change the rules for counting ballots after the election, the people of Alabama were deprived of their choice for Chief Justice for more than nine months — one-eighth of his total term of office. The Eleventh Circuit's decision in *Roe* v. *Alabama* could not give those nine months back to the people of Alabama.

What is more, the incumbent Chief Justice, who lost the November 1994 election, "continued in office" during the nine months after his term expired until Chief Justice Hooper was sworn in. *Id.* The State then had to pay salaries to both men for that nine-month period.

Moreover, the litigation itself cost the State of Alabama hundreds of thousands of dollars.

The process now unfolding in Florida as a result of the change in state law by the Supreme Court of Florida portends different, but more frightening ills. The process now under way in Florida is undermining public confidence in the presidency and the Republic itself as voters across the country watch judges and State officials stare at tiny pieces of cardboard to divine whether a voter's "dimpled chad" means the voter wanted to vote for a candidate or decided not to vote at the last minute. *Gore* v. *Harris*, No. SC00-2431, slip op. at 41 (Fla. Dec. 8, 2000) (Wells, C.J., dissenting) ("I have a deep and abiding concern that the prolonging of the judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis."). If post-election changes to election procedures in Florida are approved by this Court, other states will be flooded with similar post-election litigation. Any disgruntled candidate who loses by a narrow margin will have an incentive to file an election contest, argue for a new set of rules, and then keep counting and changing the rules until the requisite votes are "found." Such untoward results are avoided when federal courts uphold the due process requirement of fair rules for counting ballots that cannot be changed after the election to alter the outcome.

C. Other Cases Invalidating *Post Hoc* Changes in Election Procedures

Roe represents an extreme example of what can happen when election procedures are changed after an election. The situation in *Roe* was not unique, however. Other circuits have intervened in the name of due process to halt similar, fundamentally unfair *post hoc* changes in election procedures.

In *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit addressed a change in the petition requirements for candidates for alderman in the City of Chicago. The City Board of Election Commissioners applied a new "anti-duplication" rule to disallow voters' signatures on more than one candidate's petition to run for alderman; the Board also disallowed any signatures without a middle initial. *Id.* at 1055. The Seventh Circuit held that the Board's failure to forewarn candidates of these new, rigorous requirements violated due process. *Id.*

In *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit ordered a new election after state election officials handed out absentee ballots that were later voided by the state supreme court after the election. *Id.* at 1078–80. The court observed that federal courts have intervened in state elections where

> the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed.

Id. at 1078.

In *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (*per curiam*), *vacated as moot*, 409 U.S. 816 (1972), the District of Columbia Circuit concluded that a political party's retroactive application of a new and unannounced ban on winner-take-all presidential primaries violated due process. *Id.* at 570. The court noted that, if the party had announced its rule change prior to the primaries, candidates might have campaigned differently, voters might have voted

differently, and the State of California might have altered its delegate selection scheme. *Id.* at 569–70. The court observed that "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Id.*

Finally, in *Duncan* v. *Poythress*, 657 F.2d 691 (5th Cir. Unit B. Sept. 1981), *cert. dismissed*, 459 U.S. 1012 (1982), the former Fifth Circuit held that state officials' refusal to hold a special election to fill a vacancy on the state supreme court in accordance with state law violated due process. *Id.* at 708. The court observed that it could "imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights." *Id.* at 704.

These cases underscore that the right to vote, at bottom, is a *federal* right. *See Griffin* v. *Burns*, 570 F.2d at 1077. If a state election procedure is so flawed as to be fundamentally unfair, that process violates due process. Where, as in *Roe* and in this case, a state supreme court materially changes state election, canvassing, and contest procedures after an election has occurred and requires the use of arbitrary recounts, that change is fundamentally unfair and violates the due process rights of the voters and the candidates.

II. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA VIOLATES ARTICLE II OF THE CONSTITUTION, 3 U.S.C. § 5, AND THE FIRST AND FOURTEENTH AMENDMENTS.

As was the case in *Roe* v. *Alabama*, the judgment of the Supreme Court of Florida in this case substantially changed Florida election procedures after the election and applied those changes retroactively — *again*. The Supreme Court of Florida also required the use of arbitrary manual recounts that violate due process and equal protection. The dissenting opinion of Chief Justice Wells amply demonstrates the nature of the changes in election procedures made by the Supreme Court of Florida. *Gore* v. *Harris*, slip op. at 40–60 (Wells, C.J., dissenting). As Chief Justice Wells feared, by changing Florida law after the election, the Supreme Court of Florida violated the Constitution and 3 U.S.C. § 5. *See id.* at 41, 54–60 (Wells, C.J., dissenting).

A. The Judgment of the Supreme Court of Florida Retroactively Changed Florida Election Procedures — *Again*.

In *Palm Beach County Canvassing Board* v. *Harris*, Nos. SC00-2346, SC00-2348, and SC00-2349 (Fla. Nov. 21, 2000), the Supreme Court of Florida materially and retroactively changed Florida election procedures in violation of due process. *See* Br. for the State of Alabama, et al., as *Amici Curiae*, Supp. Reversal at 13–24, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Less than a week ago, this Court unanimously vacated that judgment because there was "'considerable uncertainty as to the precise grounds for the decision.'" *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___, ___ (2000) (slip op. at 6) (quoting *Minnesota* v. *National Tea Co.* 309 U.S. 551, 555 (1940)). Four days later, in an appeal from Vice President Gore's

unsuccessful election contest in State court, the Supreme Court of Florida materially changed Florida law *again*, ordering the trial court to embark on a statewide manual recount of so-called "undervotes" in the presidential election.[1]

The first and perhaps most important change effected by the Florida Supreme Court's decision in this case was the acceptance of so-called "dimpled" chads as votes. Prior to the decision in this case, there was no statewide policy requiring "dimpled" chads to be counted as votes. By accepting the returns from Broward and Palm Beach Counties, where "dimpled" chads were counted as votes, the court altered state practice. After the election, the Palm Beach County Canvassing Board changed its ten-year-old policy not to count "dimpled" ballots. The board's November 1990 guidelines made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . . an indentation is not evidence of intent to cast a valid vote." Ex. J to Emer. App. for Stay. The court's inclusion of Palm Beach County's amended returns validated this post-election change in canvassing procedure in violation of due process and 3 U.S.C. § 5.

A second major change to state law was the alteration of the standard of review applied by the circuit court. Prior to the decision in this case, the Florida courts gave great deference to the decisions made by the executive officials who implemented Florida's election laws. As noted by Chief Justice Wells, in *Krivanek* v. *Take Back*

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[1] The Supreme Court of Florida's exercise of appellate jurisdiction over an election contest involving a presidential election also runs afoul of Article II, § 1, cl. 2 of the United States Constitution. The Florida election contest statute, Fla. Stat. § 102.168 (2000), does not provide for appellate review of the trial court's decision. As grounds for its jurisdiction, the court cited only the Florida Constitution, Fla. Const. art. V, § 3(b)(5). *Gore* v. *Harris*, slip op. at 1.

Tampa Political Committee, 625 So. 2d 840 (Fla. 1993), the court stated that

> the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman*:
>
> > The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties. . . . [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Gore v. *Harris*, slip op. at 43 (Wells, C.J., dissenting) (quoting *Krivanek*, 625 So. 2d at 844–45). In this case, however, the Supreme Court of Florida ruled that executive officials were entitled to no such deference. *Id.*

at 13–14 (holding that circuit court erred in applying abuse of discretion standard). This change in the standard of review fundamentally altered the relationship between the judicial and executive branches in the election process in Florida, arrogating power to the judiciary that had not been expressly granted by the Legislature.

A third major change wrought by the Supreme Court of Florida's decision was to authorize manual recounts of only so-called "undervotes" as part of an election contest. Florida's election contest statute, Fla. Stat. § 102.168, does not mention manual recounts; "the only procedures for manual recounts are in the protest statute," Fla. Stat. § 102.166. *Gore* v. *Harris*, slip op. at 45 (Wells, C.J., dissenting). The majority concluded that the contest statute's broad grant of authority "to provide any relief appropriate under such circumstances," Fla. Stat. § 102.168(8), included the ability to order manual recounts. *See id.* at 37–38. Even assuming, *arguendo*, that this conclusion was a proper interpretation of legislative intent, the Supreme Court of Florida rewrote the manual recount provisions by authorizing a manual recount of only *certain* ballots.

The manual recount provisions in Florida law state that, if a test recount indicates "an error in the vote tabulation which could affect the outcome of the election," the canvassing board can "[m]anually recount *all* ballots." Fla. Stat. § 102.166(5)(c) (emphasis added); *see Gore* v. *Harris*, slip op. at 45–46 (Wells, C.J., dissenting) (citing Fla. Stat. § 102.166(5)(c)). In other words, "Section 102.166(5)(c) *requires that, if there is a manual recount, all of the ballots have to be recounted.*" *Id.* at 53 (Wells, C.J., dissenting). The majority below, however, altered the manual recount provision to fit the perceived needs of

this election contest, changing the statute to allow for a partial recount of only *certain* ballots. *Id.* at 16.[2]

These changes run afoul of the grant of "plenary" power to the State Legislature in Article II, § 1, cl. 2 of the United States Constitution. *See McPherson* v. *Blacker*, 146 U.S. 1, 7 (1892). These changes further violate 3 U.S.C. § 5 because all of them were adopted *after* the November 7, 2000, election and applied retroactively. Finally, these changes unleashed an arbitrary, standardless, and fundamentally unfair process of counting ballots in violation of due process and equal protection.

B. Counting Partially Punched Ballots Without Clear, Uniform Standards Attributes Political Speech to Voters Without Their Consent and Dilutes Proper Votes by "Stuffing the Ballot Box."

In *Baker* v. *Carr*, this Court noted that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by . . . a stuffing of the ballot box." 369 U.S. 186, 208 (1962) (citing *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States* v. *Saylor*, 322 U.S. 385 (1944)). The effect of the judgment of the Supreme Court of Florida was to order the circuit court and election officials in Florida to divine the intent of individual voters based on either a discretionary majority vote of local officials or the individual subjective views of the persons handling the ballots. By requiring the circuit court to accept the untimely manual recounts and include them in the

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[2] Other changes included eviscerating the deadline for submitting amended returns following an election protest and ordering the Leon County Supervisor of Elections to count Miami-Dade County ballots.

certified election results, the Florida Supreme Court adopted a standardless procedure and "stuffed the ballot box" in violation of voters' First Amendment right to freedom of expression and Fourteenth Amendment rights to due process and equal protection.

It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment protects the right of our nation's citizens not only to entertain their individual political beliefs, but also to express them. *Id.* at 30; *see also Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 2 (1986)("[T]he choice to speak includes within it the choice of what not to say."). When a citizen casts a vote, it is the ultimate expression of individual political speech and constitutes the culmination of the individual right to choose the representative governing body.

During this election, the overwhelming majority of Floridians who cast their votes using punch-card ballots did so in accordance with the instructions for properly casting ballots, and those votes were accurately tabulated in keeping with the principles of due process. As noted by the Secretary of State:

> In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in

each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

Harris Resp. to Pet. for Cert. at 15 n.12, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Thus, the requirements for casting a correct vote were well established, had been made available to every voter prior to election day, and were followed by the overwhelming majority of voters.

Changing the rules for counting partially punched ballots after the election is fundamentally unfair. Allowing counties to count so-called "dimpled chads" and stray marks as votes constitutes an arbitrary deviation from these well-established election rules and dilutes the weight given to votes that were properly punched and counted. Changing the rules for counting partially punched ballots only in certain counties also dilutes the votes of those whose partially punched ballots are left

uncounted in their county's manual recount because their county adheres to its pre-election rules. By ordering a new standardless statewide count, the Florida Supreme Court has validated these wholly arbitrary recounts and assured that innumerable non-votes will be added to a candidate's tally.[3]

Where there is no clear standard by which to evaluate inadequately marked ballots, election officials and judges will inevitably place political speech in the mouths of voters unwilling to vote for either candidate. For example, voters may enter the voting booth and have second thoughts about their decisions and change their minds mid-vote, leaving a "dimpled chad." If election officials count those indentations as votes, they are "stuffing the ballot box" by putting words into the voters' mouths.[4] The government cannot compel voters to speak when they have chosen to remain silent. *See West Virginia* v. *Barnette*, 319 U.S. 624, 631–41 (1943).

Under the Due Process Clause of the Fourteenth Amendment, voters have the right to have their individual ballots correctly counted and reported. *Gray* v.

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[3] As noted by Judge Tjoflat, "[t]his bolsters [Petitioner's] claim of a *Roe*-type violation, which dilutes the votes of bona fide voters in violation of the First and Fourteenth Amendments." *Touchston* v. *McDermott*, No. 00-15985, slip op. at 40 (11th Cir. Dec. 6, 2000) (Tjoflat, J., joined by Birch and Dubina, JJ., dissenting). In *Roe*, there was no question as to voter intent; the contested ballots would have diluted valid votes simply because they were improperly executed. *Id.*; *Roe I*, 43 F. 3d at 581. This case is much more egregious than *Roe* because valid votes are being diluted not only by improperly executed votes, but also "by the inevitable counting of markings on ballots that were *not* intended as votes." *Touchston*, slip op. at 39 (Tjoflat, J., dissenting).

[4] *Cf. United States* v. *Saylor*, 322 U.S. at 388 (holding that electors have the right to have their vote honestly counted and not diluted by stuffing the ballot box).

Sanders, 372 U.S. 368, 380 (1963). In this race, numerous ballots were correctly punched for the bulk of the races, leaving the choice for President and Vice President unselected. This indicates that, had these voters wanted to vote for any given presidential candidate, they not only knew how to do so, they had demonstrated their ability to do so. There was no option on these ballots for "NONE OF THE ABOVE." By correctly selecting candidates in other races and leaving only a "dimpled chad" or entirely unmarked portion for the presidential race, these voters exercised their right to refrain from speaking under the First Amendment. *See Wooley*, 430 U.S. at 714. Election officials should not be allowed to speak where voters have remained silent; for, with that silence, these citizens have voiced their views on the presidential race. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")

In the absence of a clear standard, the divination of these improperly marked ballots ultimately says more about the intent of the election officials than the intent of the voters. To affirm this arbitrary conduct, this Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. By impermissibly attributing this political speech to citizens who elected not to vote in a particular race, election officials effectively "stuff the ballot box" and dilute the weight of the votes of those citizens who actually voted in this race. *Cf. Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.

This action has violated the due process rights of those citizens who elected not to vote in this race and expected

that their silence would be interpreted as it was intended — as a vote for "NONE OF THE ABOVE." *See Baker* v. *Carr*, 369 U.S. at 208; *United States* v. *Saylor*, 322 U.S. at 388 ("This case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Gray* v. *Sanders*, 372 U.S. at 380 ("The [United States Supreme] Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them . . . correctly counted and reported.' ") (citations omitted). Voters who had second thoughts, or inadvertently made a stray mark, leaving only a "dimpled chad," could reasonably expect, after reading the voting instructions, that their "dimpled chad" would not be counted. Thus, by ordering the circuit court to embark on a standardless, statewide manual recount, the Florida Supreme Court not only violated the First Amendment rights of those voters who chose to remain silent, it violated the due process rights of both the voters who clearly selected a presidential candidate and those who chose to abstain from casting a vote in the presidential election.

C. By Changing the Definition of a "Valid Vote" and the Statutory Protest and Contest Periods, the Florida Supreme Court Gave an Unfair Advantage to a Campaign That Chose to "Front-Load" Its Challenges Into the Protest Period.

Under Florida law as it existed at the time of the election, a valid vote was cast, in those districts using punch cards, when the voting selection was "clearly and cleanly punched and there [were] no chips left hanging on the back of the card." Harris Resp. to Pet. for Cert. at 15 n.12, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Based on these regulations, a candidate could reasonably expect that only those ballots that complied with these instructions would be

tabulated. Moreover, under contemporary Florida law, a candidate could reasonably forego requesting a manual recount as part of an election protest because the protest period was so short. The candidate could reasonably choose to save his request for a manual recount until an election contest, where there would be more time. This was particularly true where the contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the candidate the opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3) (2000). As is evident from the events of the past few weeks, a manual recount can be an arduous and time-consuming process taking longer than a week — especially in large counties. A candidate who desired such recounts would likely know this and could reasonably decide to wait and request the manual recounts as part of an election contest where there would be more time.

By altering the definition of a "valid vote" and altering the statutory protest and contest periods, the Florida Supreme Court violated due process. As previously noted, by ordering a new standardless recount, the Florida Supreme Court sanctioned wholly arbitrary recounts and validated "dimpled chads" and stray marks as constituting valid votes. Moreover, by enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Florida Supreme Court thwarted the reasonable expectations of the candidates and gave a fundamentally unfair advantage to a campaign that chose to "front-load" its challenges into the protest period. "Had the candidates known that Florida's statutory election system allowed the selective mining of votes through its manual recount system, they might have made use of the system to request that at least some of the 180,000 ballots

containing non-votes in the presidential race be examined . . . ." *Touchston*, slip op. at 40 (Tjoflat, J., joined by Birch and Dubina, JJ., dissenting).

These post-election changes benefited the "front-loading" campaign by lowering the standards for determining a "valid vote" and then giving it the majority of the available time for its challenges while reducing the time available to the other campaign to respond in a contest. Had the candidates known that the requirements for a "valid vote" would be lowered and the protest period would have been lengthened, campaign strategies would have taken this into account. *See Roe I*, 43 F.3d at 582; *Brown* v. *O'Brien*, 469 F.3d at 569–70. By retroactively changing the election rules, however, the Supreme Court of Florida deprived the candidates of this opportunity.

III. THE FLORIDA SUPREME COURT UNLEASHED ARBITRARY RECOUNTS THAT VIOLATE DUE PROCESS AND EQUAL PROTECTION.

Aside from the constitutional problems of post-election judicially created rules for recounts, the decision of the Supreme Court of Florida requires partial, manual recounts that are wholly arbitrary and, hence, unconstitutional. In *Moore* v. *Ogilvie*, 394 U.S. 814, 818–19 (1969), this Court held that an "arbitrary formula" for the selection of presidential electors by the State of Illinois violated the Fourteenth Amendment. Similarly, in *O'Brien* v. *Skinner*, 414 U.S. 524, 530 (1974), this Court held that "New York's election statutes, as construed by its highest court, discriminate[d] between categories of qualified voters in a way that, . . . [was] wholly arbitrary" and, therefore, violated the Fourteenth Amendment.

As Chief Justice Wells explained, "The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown." Slip op. at 41 (Wells, C.J., dissenting). The Chief Justice reasoned that the Florida statute governing manual recounts "utterly fails to provide any meaningful standard." *Id.* at 51. In the light of this mandate of arbitrary recounts, Chief Justice Wells foresaw constitutional violations:

> There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Id. at 51–52.

Chief Justice Wells also explained that the arbitrary nature of the manual recounts ordered by the Supreme Court of Florida is manifold:

> The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count- are they the same standards for all ballots statewide or a continuation of the county-by-county

> constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

Id. at 57.

Even before the Florida Supreme Court entered its latest decision, three judges of the United States Court of Appeals for the Eleventh Circuit concluded that the process for manual recounts in Florida was unconstitutional:

> Florida's statutory election scheme envisions hand recounts to be an integral part of the process, providing a check when there are "error[s] in the vote tabulation which could affect the outcome of the election." *See* Fla. Stat. Ann. § 102.166(5). The 1989 Florida legislature, however, abdicated its responsibility to prescribe meaningful guidelines for ensuring that any such manual recount would be conducted fairly, accurately, and uniformly. While Florida's legislature was unquestionably vested with the power under Article II, Section One of the United States Constitution to devise its own procedures for selecting the state's electors, it was also required to ensure that whatever process it established comported with the equal protection and due process requirements of the Fourteenth Amendment to that same Constitution. Other states, such as Indiana, have provided clear and definitive standards under which manual recounts are to be conducted. *See* Ind. Code § 3-12-1-9.5 (providing in part that chads that have been

> pierced count as valid votes, but those with indentations that are not separated from the ballot card do not). Absent similar clear and certain standards, Florida's manual recount scheme cannot pass constitutional muster.

Touchston, slip op. at 64–65 (footnote omitted) (Birch, J., joined by Tjoflat and Dubina, JJ., dissenting). When the Eleventh Circuit considered this matter, manual recounts were not under way and Governor Bush had been certified as the winner, so a majority of the Eleventh Circuit concluded that Bush had not established irreparable harm. *See Siegel v. LePore*, No. 00-15981 (11th Cir. Dec. 6, 2000). That harm is now imminent.

IV. THIS CASE ILLUSTRATES THE IMPERATIVE OF LEGISLATIVE, NOT JUDICIAL, SUPREMACY IN ESTABLISHING ELECTION RULES TO ENSURE FUNDAMENTAL FAIRNESS.

Another similarity between the *Roe* litigation and the decision of the Florida Supreme Court is the special need for deferring to the exclusive, constitutional authority of legislative bodies to establish rules for voting before an election rather than allowing courts to create rules for voting to apply retroactively in post-election disputes. In both the *Roe* litigation and this case, the state courts failed to defer to the supremacy of the legislatures with disastrous results. In each case, the legislature also had sought to prevent the judicial chicanery that later occurred. Federal relief then became necessary to fulfill the guarantees of the First and Fourteenth Amendments that state courts not change legislative rules retroactively to alter the outcome of an election.

In the *Roe* litigation, the State's pre-election rules plainly prohibited post-election intervention by the Alabama courts. *See* Ala. Code § 17-15-6 (1995) (discussed in *Roe I*, 43 F.3d at 577–78 & n.4; *Roe III*, 68 F.3d at 408–09 & n.7). In the *Roe* context of the election of the Chief Justice, Alabama law also provided that only the state legislature could hear and decide an election contest. Ala. Code §§ 17-15-50 to 17-15-63 (1995) (discussed in *Roe I*, 43 F.3d at 577).

Similarly, this case presents important issues of legislative supremacy in election matters that call into question the fundamental fairness of the decision of the Florida Supreme Court. The ultimate source of that legislative supremacy, of course, is the Constitution, which provides "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors . . . ." U.S. Const. art. II, § 1 (emphasis added). The Constitution does not refer this matter to the entire State government but to the State Legislature alone. Likewise, the National Legislature required, more than a century ago, that any post-election controversy regarding the appointment of presidential electors be resolved "by laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. Representative William Craig Cooper of Ohio explained, in the congressional debate on this law, that Congress should prevent state judicial mischief in the appointment of presidential electors: "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 Cong. Rec. 47 (Dec. 8, 1886). Congress also provided that in the event of any failure to appoint electors "on the day prescribed by law, the electors may be appointed on a subsequent day *in such a manner as the legislature of*

such state may direct." 3 U.S.C. § 2 (1994) (emphasis added).

Both the Framers and Congress contemplated that the appointment of presidential electors was to be the exclusive province of state legislatures. "Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps, in most cases, of themselves determine it." The Federalist No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961). As in *Roe*, the judicial usurpation of this state legislative authority by the Supreme Court of Florida violated the Constitution, and its fundamental unfairness must be redressed by the federal judiciary.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

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